IN THE IOWA DISTRICT COURT FOR DES MOINES COUNTY

MEDIAPOLIS COMMUNITY SCHOOL DISTRICT,	)	
Petitioner,	)	Case No. LALA 001660
vs.	)	
PUBLIC EMPLOYMENT RELATIONS BOARD	)	RULING AND ORDER ON PETITION FOR JUDICIAL REVIEW
and	)	
AFSME / IOWA COUNCIL 61,	)	
Respondents.	)	

This matter is before the Court on the "Petition for Judicial Review" filed by Petitioner Mediapolis Community School District (District) on September 28, 2000. Petitioner also filed a "Petitioner's Brief" on May 15, 2001. Respondent AFSME/Iowa Council 61 (AFSME) filed an "AFSME Brief" on June 8, 2001. Respondent Public Employment Relations Board (PERB) filed a "Brief and Argument of Respondent Public Employment Relations Board" on June 18, 2001. A hearing on the matter with oral argument was held July 9, 2001, a motion day. Attorney Brett Nitzschke appeared for Petitioner. Attorney Michael E. Hansen appeared for Respondent AFSME. Attorney M. Sue Warner appeared for Respondent PERB.

BACKGROUND FACTS AND PRIOR PROCEEDINGS

Petitioner, Mediapolis Community School District, is a public school corporation for the city of Mediapolis and surrounding parts of Des Moines County, Iowa. Respondent PERB is the state agency established pursuant to Iowa Code chapter 20 responsible for, among other matters,

determining appropriate bargaining units for workers at public corporations such as Petitioner. Respondent AFSME is the union representing most of the District's non-teaching workers.

The present bargaining unit has been in existence from September 23, 1991. The bargaining unit was not contested for seven years. However, the four secretaries at issue – the elementary school secretary, the middle school secretary, and the two high school secretaries – all presently feel caught in the middle between the District and AFSME. These secretaries, most if not all of whom do not support the union, would like to leave the bargaining unit. They approached the District school board and asked the District to petition PERB. On November 13, 1998, the District filed its petition with the PERB requesting it to amend and revise the bargaining unit of Respondent AFSME/Iowa Council 61, to remove the forur secretaries.

Petitioner contended before PERB, and so contends here, that these secretaries are either "confidential employees" because they are personal secretaries of the school principals, whom they argue are involved in negotiations and directors of major divisions within the school district, or "first assistants" of directors of major divisions. On March 22, 1999 PERB Administrative Law Judge James A. McClimon held a hearing on the matter. On June 22, 1999 ALJ McClimon's "Proposed Decision and Order" denied the District's request.

On July 6, 1999, Petitioner pursued an intra-agency appeal, and filed its "Notice of Appeal to Board." On July 31, 2000 the PERB affirmed the ALJ McClimon's opinion and denied the District's request to modify the bargaining unit. Petitioner filed its present Petition for Judicial Review with the District Court on August 30, 2000.

STANDARD OF REVIEW

When the District Court reviews agency action it is a review at law, not de novo. Quaker Oats v. Ciha, 552 N.W.2d 143, 149-50 (Iowa 1996). Because this is a contested case, under the

provisions of Iowa Code § 17A.19(7) it is being heard on the record without the submission further evidence. Under the provisions of Iowa Code § 17A.19(8) (1997) and Iowa Code § 17A.19(8) (2001):

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced . . .

Iowa Code § 17A.19(8) (1997); Iowa Code § 17A.19(8) (2001). In reviewing PERB's legal conclusions, the Court "give[s] weight to the interpretation by PERB," but the Court is "not bound by the board's interpretation of Iowa Code chapter 20, and [the Court] must make an independent determination of the meaning of the statute in question." Iowa Ass'n of Sch. Boards v. Iowa P.E.R.B., 400 N.W.2d 571, 574 (Iowa 1987).

In reviewing an agency's factual findings, one of the grounds for modification is that the ruling was "unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole." Iowa Code § 17A.19(8)(f) (1997). In order to better understand what is meant by "substantial evidence" and "when the record is viewed as a whole," the Court will refer to the definition provided in the revised chapter 17A.19(10):

> (1) "*Substantial evidence*" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.
> (2) . . .
> (3) "*When that record is viewed as a whole*" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from the finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determination of veracity by the presiding officer who personally observed the demeanor of the witnesses and the

> agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Iowa Code § 17A.19(10)(f) (2001). "[T]he possibility of drawing two inconsistent conclusions from the record does not prevent an administrative agency's finding from being supported by substantial evidence." City of Davenport v. Pub. Emp. Rel. Bd., 264 N.W.2d 307, 311 (Iowa 1978). However, deference to an agency's findings is not unqualified:

> [An] agency's findings are entitled to respect; but they must nonetheless be set aside when the record on judicial review clearly precludes the agency's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 164 (Iowa 1983) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 95 L. Ed. 2d 456 (1951)).

RULING

a) Preliminary matters.

First, as a couple of preliminary matters, the Court would note that in its answer Respondent PERB argued that the present appeal should be heard pursuant to chapter 17A of the 1997 Iowa Code, because the agency proceedings were not commenced prior to July 1, 1999. *See* 1998 Iowa Acts ch. 1202, § 46 (referring to the revisions contained in Iowa's 1998 Administrative Procedure Act, and stating: "This Act takes effect July1, 1999, and applies to agency proceedings commenced on or after that date, except this Act shall apply to any agency proceedings conducted on a remand from a court or another agency on or after that date."). However, all parties in their Briefs appear to address and argue the case according to the revised standards for judicial review outlined in the 2001 version of Iowa Code § 17A.19(10). In either case, despite its laundry list of grounds for review, Petitioner appears to be only seriously arguing the issues of whether PERB's ruling is supported by substantial evidence,

whether it contains errors at law, and whether it is contrary to PERB's interpretation of the law from prior cases. Petitioner's arguments against the agency on these issues would fall under subsections (c), (f), and (h) of the revised Iowa Code § 17A.19(10) (2001). The same arguments would fall into subsections (f) and arguably (a) & (e), under Iowa Code § 17A.19(8) (1997). Therefore, the Court's Ruling on the issues will apply under either version.

The second preliminary matter is that at hearing Respondent AFSME sought to introduce two exhibits, to which Petitioner objected. The first exhibit was AFSME's summary of the PERB hearing transcript. The Court sustains Petitioner's objection to this item. AFSME's transcript summary will not be and has not been considered on this action for judicial review.

The second of these exhibits was a binder containing copies of the cases (the majority of which are PERB cases) cited in AFSME's Brief. This item will be admitted for consideration on the present action for judicial review for two reasons. It does not qualify as evidence with respect to issues of fact in the matter. Thus, it is not subject to the restriction of Iowa Code § 17A.19(7). The other reason it will be considered is that the Des Moines County Law Library contains only a few initial PERB reports. The Court would otherwise be without access to the PERB opinions cited in the parties' Briefs. Additionally, Respondent PERB had already provided with its Brief copies of PERB cases that it cited. Likewise, because of the need to review the cited cases, the Court has subsequently requested from all the parties any remaining or missing PERB cases cited in their briefs. The parties have sent these by fax. Therefore, Petitioner's objection to this item is overruled.

b) Secretaries as "Confidential Employees."

At issue in this section of this Ruling is whether the secretaries qualify as "confidential employees" who should be removed from the bargaining unit of AFSME. PERB's legal

findings, and similarly this Court's legal analysis on the present petition for judicial review, must be performed mindful of the Iowa Supreme Court's overall guidance in the matter of defining a bargaining unit:

> The Iowa Public Employment Relations Act is written in broad language so as to allow a large number of public employees to be eligible for coverage under the Act. We will read the exclusions under section 20.4 narrowly to promote the Act's broad application.

Iowa Ass'n of Sch. Boards v. Iowa P.E.R.B., 400 N.W.2d 571 (Iowa 1987). Iowa Code § 20.4(3) exempts "confidential employees." Iowa Code § 20.3(3) provides a definition for confidential employee, which states:

> "*Confidential employee*" means any public employee who works in the personnel offices of a public employer *or who has access to information subject to use by the public employer in negotiating* or who works in a close continuing working relationship with public officers or representatives *associated with negotiating on behalf of the public employer*.

Iowa Code § 20.3(3) (1997); Id. (2001) (emphasis added). Nothing in the statute classifies a person as a confidential employee if they have occasional access to personnel and disciplinary information while not working in a personnel office, in a close continuing relationship with a boss associated with negotiating, or in the office of a director of a major division. *See infra* section "c" (addressing the "major division" issue). Petitioner argues that in a past PERB case, *Scott County*, 95 H.O. 5108, the hearing officer ruled that a worker's every-day access to confidential personnel files of the employer, even without meeting the statutory prerequisites of working in a personnel office or for a negotiator, mandated the exclusion of such a person from the bargaining unit. However, the Court agrees with PERB's statement in its brief that "any decision to expand the statutory exclusions should properly be made by the legislature, not PERB." (Brief and Argument of Respondent PERB, at 6, n. 2).

Petitioner argued and the secretaries testified to feeling uncomfortable and stuck in between the union and the District. In its Decision on Appeal, PERB found that the secretaries' discomfort mostly comes from their occasional involvement in disciplinary or staff matters. None of the secretaries testified to any union members seeking advance information from them about the District's strategy in collective bargaining. Most importantly, while some of the Principals grant their secretaries discretion in opening mail and memos marked confidential to a principal, some of which may have been District memos reporting on the progress of negotiations, none of the secretaries could testify to having seen any advance information on the District's negotiating strategies or positions. The following quotes from the transcript illustrate this fact and support PERB's finding that the secretaries are not confidential employees for bargaining purposes:

> Q. I guess what I'm asking, MaryAnn, is do you have access to information that would provide an advantage to the Union in bargaining?
> A. I'm not thinking of anything. I don't – no. Nothing comes to mind.

(Transcript, at 163, testimony of elementary school secretary MaryAnn Walljasper);

> Q. Is it your belief that your principal is involved in the negotiations with this union?
> A. I don't think so.
> Q. Do you have access in your job to information that would be beneficial, or provide the Union an unfair advantage in bargaining?
> A. What do you mean?
> Q. Information that the Union would like to have that would help them get a better contract, I guess, more favorable to them?
> A. Do I have information to that fact, is that what you're saying?
> Q. Uh-huh.
> A. I don't think so.

(Transcript, at 173-74, testimony of high school secretary Nettie Luckenbill);

> Q. Do you have access to information that the Union might find helpful in collective bargaining, or would give the Union an advantage in collective bargaining as part of your job?

A. I could probably have access in my position.
Q. Do you know what it is you could have access to?
A. Just like from transferring from this office to the high school office, anything that might be distributed that way.
Q. Do you know what those are, or what kind of information they have in them?
A. No.

(Transcript, at 177, testimony of high school secretary Denise Roelfs). Additionally, while Petitioner states that one secretary asserted access to information in a memo that would have provided an unfair advantage to AFSME in negotiations, this secretary was evasive when asked to specify:

Q. Was there anything in any of these documents that you could have given to the Union and given them an unfair advantage?
A. Yes.
Q. What would that be?
A. Oh, when they have discussed another teacher associate.
Q. I'm sorry, what?
A. When they've – when the actions of the teacher associate was involved.
Q. I'm not sure what you mean. The actions of the teacher associate?
A. Well, you're saying – what was your first question?
Q. My question was do you have access to information that would have been useful to the Union in bargaining?
A. That has been sent from the superintendent's office to –
Q. Possibly, or from anywhere else?
A. A lot of things I don't retain because I don't think it should be sent any further.

(Transcript, at 144-45, testimony of middle school secretary Bette Siefken). The secretaries' testimony demonstrates no access to bargaining strategies that would invalidate PERB's findings.

While, Petitioner claims in its brief before the Court that the Principals testified that the secretaries had access to advance negotiating strategies appearing in memos, Petitioner provides no citation to the transcript to support the assertion and refute PERB's findings. In fact one of

the principals testified that the memos did not contain information that would give the Union an unfair advantage:

> Q. Do you have information in your office that your secretaries might have access to that would give AFSME an unfair advantage at the bargaining table?
> A. Only if it would come across as a memo from the superintendent.
> Q. Can you give me an example of that?
> A. He sends out memos to the board, and we receive all memos that are also sent to the board. There could be, in those memos, information about negotiations.
> Q. Well, information that would give the Union an advantage that they would not normally have; is that what's in those memos?
> A. I don't know that that would be the case.

(Transcript, at 87-88, testimony of high school principal Phil D. Speece). Petitioner has not sufficiently buttressed its argument that the principals' testimony contradicts PERB's determination that the memos did not contain the District's advance negotiating strategies.

Likewise, nothing in Superintendent Newman's testimony presents evidence of *specific* information in the alleged memos that could have given the union an unfair advantage in bargaining. He simply generalizes in stating that the memos contained "[w]hat has occurred in negotiations, and what the District's position might be." (Transcript, at 18, testimony of Superintendent William Lee Newman). He gives no specifics. The only time he tries to delineate any specific negotiating proposal, as the subject of a District strategy that might have appeared in a memo, it is an example of offering a 2.2% raise when the District funds might allow 3% raise. (Transcript, at 183-84, testimony of Superintendent William Lee Newman). However, even this is a hypothetical example, and the alleged communication would have been more an exercise in gathering information from a principal to see whether the District could eliminate a position in order to propose a 2.2 percent raise. *See* (Id., at 183 line 24 to 184 line 14) (answering with the following hypothetical:

Q. But you give us – you give the Union those same figures, don't you?
A. No. If we know -- We give you – you know how bargaining works, Steve. We give you a total package that might be 2.2 percent, knowing that we can go to 3 percent. The principals *may* get a flier – or a memo from me . . .

. . . .

A. Then they come back and they say, "We absolutely have to have this position . . .") (emphasis added).

Therefore, the superintendent's testimony is similar to the principals' in that it does not present any evidence of specific advance negotiating strategies in the memos. The superintendent's testimony does not disturb PERB's finding that the memos did not contain advance negotiating strategy.

Most importantly, as PERB points out in its brief, Petitioner had the burden to prove secretarial access to advance negotiating information that would afford an unfair advantage to the union in bargaining, yet Petitioner did not present *any* of these memos into evidence. The only indication that these memos contained anything other than reports on the *progress* of negotiations comes from the unsupported assertions of the District's witnesses. No copies of the memos, so pivotal to an assessment of Petitioner's claim, are available to corroborate the testimony of the Principals and the Superintendent.

The Administrative Law Judge ordered Petitioner to produce the alleged memos containing the alleged advance information on the District's negotiating strategies. *See* (Transcript, at 208) ("Based on off-the-record discussion, and pursuant to my previous direction to the District, *any* documents *will be mailed* to me and Mr. Siegel by no later than March 30th.") (emphasis added). Even after the Hearing Officer had given Petitioner extra time subsequent to the hearing to produce documents, counsel for Petitioner refused to produce what it had of these memos. *See* (Letter from Brett S. Nitzschke to Jim McClimon of 3/29/99, added to "Public Employer / Petitioner's Brief" to PERB ALJ, tab 15 in the PERB record) (stating:

> I am writing in response to your *order* to respond to Mr. Siegel's request for information regarding whether the Mediapolis Community School District still retained the packages of inter-school mail that Superintendent Newman testified at hearing was sent from Central Office to the principals in the various schools in the District.
>
> . . . .
>
> While Superintendent Newman was searching for this information, he found *some* of the information that was included in the inter-school mail to the principals at the elementary, middle school and high school buildings. Although this information was not a complete set of materials he had sent, *these materials are consistent with his testimony at hearing regarding the nature and substance of those materials*. The information that Superintendent Newman has discovered does contain confidential information that deals specifically with personnel matters, issues involving other unions in the District and other confidential and sensitive information. Based upon the nature of this information and the fact that *a complete copy* of the information requested does not exist, *there is no information* that satisfies Mr. Siegel's request and therefore no documents have been produced with this letter.) (emphasis added).

However, in its Reply Brief to the Court, Petitioner shifts to an argument that none of the material exists at all, stating that "the Superintendent searched for this information and was unable to find this information because it had been destroyed." (Petitioner's Reply Brief, at 5, n.2). In light of its refusal to support its witnesses' testimony with the pivotal material evidence that it at one point admitted was available, Petitioner can hardly complain now that PERB's Decision on Appeal lacked a foundation as a fair estimate of the worth of the testimonial evidence under the substantial evidence standard. Additionally, the Court would alert Petitioner that had this case originated as a civil case for trial before this Court, Petitioner's rather arrogant and duplicitous refusal to obey a discovery order, without even first requesting some kind of protective order, might well have warranted Rule 134(b)(2) sanctions.

While stating in his ruling that "the superintendent utilizes the District's interoffice mail to update principals on the status of negotiations, as well as the District's bargaining positions," PERB ALJ McClimon continued on to find that "there is no evidence to suggest that the

secretaries consider the contents of the mail as the type of information used by the District in contract negotiations." (Proposed Decision and Order, at 14). However, considering Petitioner's refusal to produce the alleged memos, the secretaries' inability to testify to any information they might have seen that could have given the union an unfair advantage in negotiations, and the wavering and unconvincing nature of the principals' and the superintendent's testimony as to the contents of the alleged memos, the Court agrees with PERB's finding in its Decision on Appeal, which stated:

> There is no evidence in the record, however, about the *specific* contents of those memos, nor is there any evidence indicating that any secretary has seen any *specific* advance information about District negotiations positions or strategies in inter-office mail. Under these circumstances, we cannot conclude that the secretaries have been shown to have access to information that would afford an employee organization undue advantage at the bargaining table.

(PERB Decision on Appeal, at 7-8) (emphasis added). The Court perceives the District's witnesses' testimony as to the content of the memos to be lacking in credibility. Therefore PERB's finding that the memos did not contain advance negotiating information is supported by substantial evidence.

A related issue is whether Petitioner can show the principals to be associated with negotiating. None of the principals' testimony clearly showed the principals to be involved in advance negotiating strategy. The following excerpt from the middle school principal demonstrates this fact:

Q. Are you on the District's bargaining team?
A. No.
Q. Have you ever been?
A. On a bargaining team?
Q. Here.
A. Not here.
Q. You have in other districts, though?
A. Once.

Q. Okay. Which one was that?
A. Clarinda.
Q. Okay. Ever been present at any bargaining session here?
A. No.
. . . .
Q. I'm going to let you look at them [documents from the '98-'99 collective bargaining]. Can you find anything in here that you had input into?
. . . .
A. Let me say it's difficult – We have weekly administrator meetings with the superintendent, and we exchange information, and it's kind of difficult for me to know if any of the things that we've talked about had ever impacted directly on something like this, but what might have been discussed, or information he may have from administrators may have somewhere along the line.
Q. Okay. Would it be fair to say –
A. But I'm not directly involved with the negotiations.
Q. You don't read the proposals, proof them, review them, offer proposals?
A. No. I do not do that.

(Transcript, at 61-62, testimony of middle school principal Aldace Naughton III). The other two principals' testimony is less than clear and even somewhat contradictory:

Q. All right. Are you on the District's bargaining team for the AFSME negotiations?
A. No, I do not sit at the table for bargaining.
Q. You've never been present at a bargaining session?
A. No.
Q. Are you familiar with the bargaining as it goes on, or involved in any way?
A. Yes. Our administration team meets almost weekly, and Dr. Newman and the principals do discuss some of the procedures and actions that are taking place at the bargaining table for all employees and all different unions, right.
Q. Do you have input into those contracts?
A. In those meetings we do, uh-huh.
Q. Can you give me an example of your input?
A. We might talk about salaries, we might talk about the needs – how many people we might need, whether next year we're going to need a full staff. With reductions, sometimes we have input there, if we feel there's going to be a reduction in staff because of reduction in student enrollment.
Q. Do you write proposals?
. . . .

A. No.

(Transcript, at 85-87, testimony of high school principal Phil D. Speece);

Q. . . . Do you consider yourself to be an individual associated with negotiations on behalf of the District?
A. I'm not directly involved as far as being at the negotiations meetings, but we do discuss the items at our administrative meetings.
Q. Do you have input into the contract or into proposals?
A. Yes.
Q. Can you give me an example of some of your input?
A. Oh, when we get down to talking about voluntary and involuntary transfers, and reduction in staff.
Q. Can you be a little more specific about your input?
A. Like I said, we talk about it in administrative meetings, and – I guess I don't know what more specific you want.

(Transcript, at 115, testimony of elementary school principal Tanya Langholdt). Neither Principal Speece nor Principal Langholdt, could point to any language in the contract or contract proposals that flowed from a recommendation they made:

Q. Mr. Speece, you indicated you had input into the transfer language in the contract?
A. We discussed, yeah, the transfer language.
Q. Is there any particular – this is it here. Is there anything in there that you could show me that has your fingerprints on it, something you came up with?
A. Nothing that was my individual recommendation. As a matter of fact, I think a lot of these have been in there for quite a while.

(Transcript, at 99-100, testimony of high school principal Phil D. Speece);

Q. Okay. This transfer language that you're saying the group collectively had impact on, can you tell me what that impact was?
A. Boy, I couldn't right now. I'd have to see it. I can't remember. I know we talked about it last spring, but I don't recall.
Q. Okay. I'll give you a chance to refresh your memory here. Here's the proposals from both sides last year. See if you can find something in there that you might have had impact on.

. . . .
THE ADMINISTRATIVE LAW JUDGE:
Mr. Siegel, can you point out to the witness what you're looking at specifically?
MR. SIEGEL:

Well, there's various proposals in here. I don't know.
THE ADMINISTRATIVE LAW JUDGE:
As to transfer.
MR. SIEGEL:
What is that, Article VI? Article VIII? Okay. Here's Article VIII.
A. I don't know if it was a change or just clarification on my part. I believe – that's a long time ago. I'm thinking it had to do with the special ed. associates, if I'm remembering right, and I hope that's right. But I think we were looking at – seniority was the main avenue for associates to bid on positions, and with some of our one-on-one special needs students, I guess that was a concern of mine. Sometimes the person with the most seniority for the position may not have the disposition for being the most successful.
Q. I don't believe the language stops them from being –
A. I don't know if that was a change last year, or something we talked about and I got clarification. I'm thinking that's what it was.

(Transcript, at 125-27, testimony of elementary school Principal Tanya Langholdt). Other than weekly meetings where the Superintendent apprised them of the progress of negotiations, the principals were not involved in formulating advance negotiating strategy.

The superintendent also answered that the principals are not included on the bargaining team. (Transcript, at 33, testimony of Superintendent William Lee Newman). And while Superintendent Newman stated that he seeks advice from the principals as to which workers or positions might be acceptable to them for potential layoffs, he does not say that they formulate any strategy on how and exactly what to present as proposals concerning or implicating layoffs to AFSME at the bargaining table. Likewise, he does not say that such discussion would occur through or appear in interoffice mail.

In *Johnston Community School District*, 76 PERB 500, two of the reasons PERB found the principals there to be associated with negotiations and the secretaries subject to exclusion, was "(4) that the principals were present at one bargaining session; and (5) . . . the secretaries prepared rough drafts and typed final copies of the 'principals' responses to association proposals, and suggestions for counterproposals made at the request of the superintendent.'"

There is no evidence whatsoever that the secretaries here typed negotiating proposals for the principals, or that the principals engaged in drafting negotiating proposals. This difference between the present case and *Johnston Community School District* is important, and distinguishes the cases from each other under the directions of Iowa Code § 20.3(3).

The secretaries', the principals', and the superintendent's testimony all support PERB's finding that "the principals are not persons 'associated with negotiating on behalf of the public employer' within the meaning of the statutory definition." (Id., at 9). The memos have not been shown to contain the District's advance negotiating strategies. For all the above reasons the secretaries cannot meet the statutory definition of "confidential employees."

c) Secretaries as Secretaries or First Assistants to Directors of Major Divisions.

Petitioner alternatively argues that PERB's findings, that the schools were not "major divisions" and that the principals' secretaries were not secretaries or "first assistants" to directors of major divisions, cannot be supported by substantial evidence. Petitioner also argues that the PERB ruling contains an erroneous interpretation of law. Iowa Code § 20.4(3) excludes "confidential employees" from the bargaining unit. The second paragraph of Iowa Code § 20.3(3) states:

> "*Confidential employee*" also includes the personal secretary of any of the following: . . . the administrative officer, director, or chief executive officer of a public employer of major division thereof, or the deputy or first assistant of any of the foregoing."

Thus, if the principals qualify as officers or directors of a major division then their secretaries would have to be excluded from the bargaining unit as confidential employees pursuant to Iowa Code §§ 20.4(3) and 20.3(3).

However, the superintendent's testimony lends support to the finding that the principals are not directors of major divisions:

Q. Do the principals have independent authority to discipline, terminate, layoff, reduce hours, or does that decision ultimately get made here by yourself?
A. I would say they do not have independent. I'd say it's joint.
. . . .
Q. Is it fair to say ultimately you're the one that makes the call?
A. I think that's fair to say.

(Transcript, at 30, testimony of Superintendent William Lee Newman). Likewise, PERB ALJ McClimon specifically noted:

> [T]here is no evidence establishing the principals' independent authority to manage each school's educational and operational functions. For example, there is no evidence indicating each principal's exclusive authority to either draft and administer a budget or independently supervise personnel.

(Proposed Decision and Order, at 9). In *Johnston Community School District*, while finding that the principals there were persons associated with negotiations, PERB specifically eschewed a finding that principals are directors of a major division, whose secretaries would be excluded. (Johnston Community School District, 76 PERB 500). PERB noted in its Decision on Appeal in the present dispute that "PERB has long held that the term 'major division' means an organizational component larger than each individual school in a district." (Decision on Appeal, at 10) (citing Johnston Community School District, 76 PERB 500). At hearing Petitioner's argued that a "grade" is the District's smallest unit, not a school. PERB countered that each grade does not have a non-teaching administrator. Therefore, a school is the District's smallest operational unit and cannot be a major division. The Court agrees that for all the above reasons the principals are not directors of "major divisions," and thus their secretaries cannot be excluded from the bargaining unit on this basis.

Likewise, the Court does not find the secretaries to qualify as "first assistants." The statute at issue here defining "confidential employees" excludes from the bargaining unit the

director of a major division's "deputy or first assistant." Iowa Code § 20.3(3) (2001). The Code does not define "first assistant," but the meaning can be gleaned from the association with "deputy." Both of these words speak to a first assistant's ability to perform the functions of the director as the head supervisor of a major division. Petitioner presented no evidence that the secretaries are authorized to, or have ever, supervised or ran their respective schools in the principal's absence. PERB ALJ McClimon's analysis of this issue demonstrates that PERB precedent is consistent with this interpretation of the statute. *See* (Proposed Decision and Order, at 9-10) (citing 82 H.O. 2197 and 81 PERB 1751). The Court does not find the secretaries to be first assistants to an officer or director of a major division.

d) Comment on District Principals' practices concerning mail marked confidential.

Lastly, Superintendent Newman testified that District could not avoid affording the secretaries access to sensitive information:

> Q. Could there be a policy established where if it said confidential, it meant confidential and that the principal should open it, not the secretary?
> A. Principals are educational leaders, and they need to rely on the secretary to funnel and to deal with those kinds of issues, and I feel like they need to – I wouldn't make that policy because that would put a burden on the principal of having to open his own mail and regard everything that comes across the desk. And it may be in a stack of mail that he wouldn't get to immediately if it just came confidential. And if the secretary sees it and it's confidential, she notes "This is something you should get right away," opens the mail and hands him the letter, has access to it.

(Transcript, at 39-40, testimony of Superintendent William Lee Newman). PERB addressed the issue of the secretaries' access to mail marked confidential from the superintendent to the principals. PERB stated:

> In addition, we are concerned about interpreting the term "access" so broadly as to include circumstances such as those here, where, if such access is afforded, it is not only occasional and limited, but is in fact not

> even necessary. We think it incumbent upon an employer concerned about maintaining confidentiality of negotiations information to take reasonable measures to insure that access to such information is limited to those who need it. Otherwise, employers could unnecessarily broaden the narrow statutory exclusion, either purposefully or thoughtlessly by simply allowing access to information to persons who have no legitimate business need to have such access. Here, if the District were truly concerned about secretaries' access to certain memos, it would seem a simple enough matter to limit access by, for example, sending the memos to principals in sealed envelopes marked "confidential" and requiring delivery directly to principals.

(Decision on Appeal, at 8-9). Petitioner argued that PERB exceeded its authority in this passage, and in its Reply Brief continued to take issue with this part of PERB's ruling stating that "the record clearly shows that if the District were to adopt a policy suggested by PERB to stamp all negotiations information confidential and prohibit secretaries from opening anything marked confidential, this would not prevent the secretaries from having access to this information." (Petitioner's Reply Brief, at 6, n.4). However, as Petitioner noted, PERB in its Brief did clarify the passage in stating that "this discussion constitutes dicta, and merely reflects the Board's legitimate concerns about the effects of interpreting the 'access to information' exclusion too broadly." (Brief and Argument of Respondent PERB, at 10, n.3).

The Court does not perceive anything improper in this passage. It appears that PERB was addressing a District argument, flowing from Superintendent Newman's testimony, concerning the opportunity for, and indeed the alleged necessity for, the secretaries' to open and have access to a principal's "confidential" mail. In the Decision on Appeal, PERB did note: "Although the District argues that secretaries would still have 'access' to such information, we presume that term 'access' used in the statute refers to 'legitimate' access." (Decision on Appeal, at 9, n.2). The Court would agree with PERB's assessment. Taking the District's argument to its logical extreme, all mail curriers that might be employees of a public employer, or anyone

who might occasionally perform such a duty, would have to be excluded from bargaining units. This would afford a public employer the opportunity to exclude many, if not all, of its employees and employee positions from union eligibility, contrary to legislative intent. Additionally, the Court simply does not find the Superintendent's testimony on this matter to be credible. Principals would not be "burdened" if they themselves had to open a weekly memo or two, should it in fact contain negotiating strategies.

Additionally, this paragraph in PERB's Decision on Appeal might be directly applicable as addressing the possibility of the parties appearing before the board on a prohibitive practices dispute. That could be what PERB was addressing. It would be a legitimate concern of an administrative body such as PERB that parties not maneuver their own subsequent practices so as to undermine a PERB ruling and the legislative intent upon which it was based.

JUDGMENT AND ORDER

For the above stated reasons, IT IS ACCORDINGLY ORDERED that the Public Employment Relations Board's July 31, 2000 "DECISION ON APPEAL," in PERB Case No. 5927, be and is hereby AFFIRMED. Costs of this action are assessed against Petitioner Mediapolis Community School District.

Dated and signed this 10th day of August, 2001.

Cynthia H. Danielson
JUDGE FOR THE EIGHTH JUDICIAL
DISTRICT OF THE STATE OF IOWA

Copies to:
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